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Supreme Court, U.S.
FILED

021770 JUN 2 2003

No. 02-

IN THE

Supreme Court of the United States

TABLE MOUNTAIN RANCHERIA,

Petitioner,

v.

AMERICAN VANTAGE COMPANIES,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fifth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether state-law claims for breach of contract brought against an Indian Tribe by a private gaming management company, involving matters integrally related to the Tribe's control over its gaming operations, are completely preempted by the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, and may be pursued only in federal court.

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IN THE

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No. 02-

TABLE MOUNTAIN RANCHERIA,

Petitioner,

v.

AMERICAN VANTAGE COMPANIES,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fifth Appellate District

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal in this case.

OPINIONS BELOW

The opinion of the California Court of Appeal (App., *infra*, 1a-9a) is reported at 103 Cal. App. 4th 590. The order of the California Supreme Court denying review (App., *infra*, 13a) is not reported. The opinion of the United States District Court for the Eastern District of California in a related case (App., *infra*, 14a-19a) is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit in that case (App., *infra*, 20a-23a) is reported at 292 F.3d 1091.

JURISDICTION

The judgment of the California Court of Appeal was entered on November 7, 2002. The California Supreme

Court denied review on March 5, 2003. (App., *infra*, 13a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Relevant portions of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, and associated regulations, 25 C.F.R. §§ 501 *et seq.*, are set out in the appendix, *infra*, at 24a-46a.

STATEMENT OF THE CASE

Congress passed the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 *et seq.*, in 1988. The Act establishes a comprehensive federal scheme to regulate virtually every aspect of gaming operations conducted by Indian Tribes on Indian lands. A primary purpose of the Act was to establish federal standards and oversight for such gaming operations, in order to shield Tribes from "organized crime and other corrupting influences," to ensure that Tribes would be the primary beneficiaries of gaming operations, and to promote tribal economic development and self-sufficiency. 25 U.S.C. § 2702; *see generally, e.g., Seminole Tribe* v. *Florida*, 517 U.S. 44, 48-49 (1996). To implement these "federal standards," Congress intended to "expressly preempt the field in the governance of gaming activities on Indian lands." S. Rep. No. 100-446, at 6 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3076.

This case provides a good example of the sort of exploitation by non-Indians that IGRA was designed to prevent. Petitioner the Table Mountain Rancheria Band of Indians (Table Mountain or the Band) is a federally recognized Indian Tribe with tribal lands situated within the boundaries of Fresno County, California. The Band's gaming operation is its principal economic asset, and provides support for the tribal government and its benefit and development programs. *See* 25 U.S.C. § 2710(b)(2)(B) (providing that net gaming revenues must be used for tribal government operations, providing for the general welfare of the Tribe and its members, tribal economic development, charitable donations, or funding of local government agencies).

Respondent American Vantage Companies, Inc. (AVC) is a Nevada corporation that the National Indian Gaming Commission (NIGC) specifically found to be unsuitable to manage a tribal gaming operation. AVC nonetheless extracted almost $50 million from the Band's gaming operation before the Band was able to terminate its association with AVC.[1] And AVC now seeks to collect, by suing the Band in state court on purported state-law breach-of-contract claims, some $15 million more that it alleges it should receive under two alleged agreements with the Band. The question presented here is whether such state-law claims are completely preempted by federal law, and must be pursued in federal court. It might equally be framed as whether IGRA's protective guarantee of federal oversight is to be honored, by assuring that claims arising from a Tribe's decisions concerning governance of its gaming operations will be decided by federal courts applying federal law.

1. IGRA imposes federal regulatory control over the conduct of gaming operations, in part in order to "protect[]

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[1] This case was decided below on jurisdictional grounds, and no findings of fact have been made. The factual description herein includes facts that Table Mountain would expect to prove at trial.

the tribes . . . from unscrupulous persons." S. Rep. No. 100-446, *supra*, at 2. The NIGC, established by IGRA, has broad powers to oversee tribal gaming operations and to enforce the requirements of federal law. 25 U.S.C. §§ 2704-2706. The Commission is charged with "monitoring" Indian gaming operations "on a continuing basis," 25 U.S.C. § 2706(b), and it has the power to levy fines and to order the closure of a gaming operation if it finds a violation of IGRA, an NIGC regulation, or a tribal ordinance. 25 U.S.C. § 2705(a)(1), (2); § 2713(a), (b).[2]

IGRA also imposes strict controls over the management of gaming operations. To shield Tribes from "unscrupulous" or corrupting influences, non-Indian contractors who have a direct financial interest in, or management responsibilities under, a management contract must undergo a background investigation, and secure approval from the NIGC as to their suitability for the fair and legal conduct of gaming operations. 25 U.S.C. § 2711(a), (e).[3] The NIGC must also

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[2] As part of this monitoring responsibility, the NIGC must inspect and examine the premises where gaming is conducted on Indian land. 25 U.S.C. § 2706(b)(2). The NIGC may demand access to and inspect, examine, photocopy and audit all papers, books and records relating to gross revenue from Class II gaming and any other matters necessary to carry out the Commission's duties. 25 U.S.C. § 2706(b)(4). The NIGC may order permanent closure after notice and a hearing, subject to review in federal court. 25 U.S.C. § 2713(c). The NIGC has also promulgated comprehensive regulations to implement IGRA's provisions. 25 C.F.R. §§ 501 *et seq.*

[3] IGRA requires that a Tribe's gaming ordinance establish a system to ensure adequate background investigations of primary management officials and key employees and to provide for ongoing oversight of these individuals. 25 U.S.C. §2710(b)(2)(F)(i). This system must include licensing of all such personnel, notification to the NIGC of the results of the background check before any license is issued and notification of the NIGC when any license is issued. 25 U.S.C. § 2710(b)(2)(F)(ii). The system must also contain standards under which those who might pose a threat to the public interest or to the regulation of gaming are ineligible for employment. 25 U.S.C. § 2710(b)(2)(F)(ii)(II). An annual outside

approve all management contracts. 25 U.S.C. § 2711(a)(1); 25 C.F.R. § 502.15. An unapproved management contract is void. 25 C.F.R. § 533.7. Whether a contract is styled a "management" contract is not dispositive; any contract that "provides for the management of all or part of a gaming operation" is a de facto management contract regulated under IGRA. 25 C.F.R. § 502.15. Similarly, any collateral agreement that "is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe" and a management contractor or subcontractor, is considered a management contract under IGRA. 25 U.S.C. § 2711(a)(1), (3); 25 C.F.R. § 502.5. *All* contracts for services over $25,000 (except those for legal or accounting services) must be included in the Tribe's annual outside audit. 25 U.S.C. § 2710(b)(2)(D).

Where IGRA addresses judicial review, it provides for jurisdiction in the federal courts. *See* 25 U.S.C. § 2710(d)(7)(A) (granting federal courts jurisdiction over suits brought by a Tribe arising from a State's failure to enter into negotiations for a Tribal-State compact; suits brought by a State or Tribe to enjoin Class III gaming conducted in violation of a compact; and suits brought by the United States to enforce procedures related to negotiation of compact); 25 U.S.C. § 2711(d) (Tribe may sue in federal court if NIGC has not acted to approve or disapprove a management contract within specified period of time); 25 U.S.C. § 2713(c) (final decision by NIGC to levy fine or close gaming facility is reviewable in federal district court); *see also Gaming Corp. of America* v. *Dorsey & Whitney*, 88 F.3d 536, 545 (8th Cir. 1996) (noting that "[e]very reference to court action in IGRA specifies federal court jurisdiction" and that "[s]tate courts are never mentioned").

2. a. In 1993, Table Mountain entered into a "Management Consultant Contract" with the corporate

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audit must be performed, and forwarded to the NIGC, of a Tribe's gaming revenues and related matters. 25 U.S.C. § 2710(b)(2)(C).

predecessor of AVC. Under the contract, AVC was to manage Table Mountain's gaming operations in return for 35 percent of the net revenue from those operations. AVC submitted the contract to the NIGC for approval, informing the NIGC that AVC had "commenced management activities" at Table Mountain—despite IGRA's prohibition on doing so in advance of NIGC approval. Clerk's Transcript on Appeal (C.T.) at 427:21-22. The NIGC did not approve the contract. Instead, the NIGC concluded in 1994 that neither AVC nor its president, Ron Tassinari, was "suitable" for involvement in Indian gaming. *Id.* at 157. By this time, AVC had already collected $1.3 million in "management consultant" fees from Table Mountain.

When the NIGC learned that AVC had continued to manage the Band's gaming operations without an approved contract, it initiated an enforcement action against the company, which was settled in 1996. Although AVC admitted to having engaged in illegal management of the Band's gaming operations, and although it had by this time collected more than $14 million in fees from the Band for that management, it paid a fine of only $500,000 under the settlement. *Id.* at 174-180, 145:1-6. AVC would extract another $32 million in fees before the Band was finally able to terminate its association with AVC in 1999. *Id.* at 333, 349-404.

Remarkably, as part of its settlement of the enforcement action, AVC convinced Table Mountain's then-Chairman, Vern Castro, to replace the illegal "Management Consultant Contract" with two new agreements: (1) a "Termination Agreement," which called for a payment of $16.8 million by the Band to "terminate and extinguish . . . rights, duties, and obligations" under the already void Management Consultant Contract, and (2) a "Consulting Agreement," under which AVC was to provide "technical assistance, advice, training and consulting services in connection with the operation and business affairs" of the Band's gaming enterprise. App., *infra*, 2a-3a. AVC was to receive a monthly fee for its

services, with the fees tied to the net revenue of the gaming operation—as is typical under management contracts. Cons. Agrmt. ¶ VI and Amendments to Cons. Agrmt.; 25 U.S.C. § 2711(c). The "technical assistance, training and advice" that AVC was to provide under the consulting agreement covered virtually every conceivable aspect of the gaming operation, and the payments to be made under both contracts provided AVC with essentially the same amount of money that AVC would have received had the void "Management Consultant Contract" remained in effect. C.T. 251-256, 144-145.

Both agreements specified that they were to be "governed by the laws of the United States." Term. Agrmt. ¶ 15; Cons. Agrmt. ¶ XVIII. The Consulting Agreement provided that either party could seek relief for breach "in a United States District Court." Cons. Agrmt. ¶ VII.B.2.[4] Both contracts were submitted to the NIGC, which determined that on their face the documents were not management contracts, and therefore did not require NIGC approval. See App., *infra*, 2a-3a. Mr. Castro signed both the termination and consulting agreements—purportedly on behalf of the Band but, in the Band's view, without the authority necessary to bind the Band. *See id.* at 3a, 8a.

In February 1999, the NIGC, concerned that AVC was still illegally managing the Band's gaming operations, and about reports that Mr. Castro was misusing tribal funds, issued a subpoena to the Band's government office. When there was no response, the Band was notified that its casino could be closed. C.T. 434. Mr. Castro was subsequently removed from office through a recall election. Shortly after

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[4] The Consulting Agreement provided for suit in a California court if, but only if, the federal district court could not exercise jurisdiction over the claim. Cons. Agrmt. ¶ VII.B.2. Each agreement included a limited waiver of the Band's sovereign immunity for purposes of enforcement. Term. Agrmt. ¶ 9; Cons. Agrmt. ¶ X.

new officers assumed control, the Band terminated its involvement with AVC. See App., *infra*, 3a.

b. In June 1999, AVC sued Table Mountain in federal district court, claiming breach of contract and alleging subject matter jurisdiction based on diversity. The Band filed an answer and raised various counterclaims, alleging that its claims arose under federal law because they related to the validity of contracts governed by federal law. App., *infra*, 15a.

The district court dismissed AVC's complaint, *sua sponte*, for lack of subject matter jurisdiction, because an Indian Tribe is not a citizen of any State for purposes of diversity jurisdiction. App., *infra*, 15a-16a. AVC accepted the court's invitation to replead its claims, but again alleged only diversity jurisdiction. The district court then entered a final order dismissing the case. *Id.* at 16a-19a.[5]

The Ninth Circuit affirmed. App., *infra*, 20a-23a. The court agreed that AVC's case could not be maintained on the basis of diversity jurisdiction, which was the only basis for federal jurisdiction that AVC had alleged. *Id.* at 20a, 22a. On appeal AVC also argued, for the first time, that the federal courts had jurisdiction because IGRA has been found to completely preempt state law insofar as it applies to matters, such as gaming management contracts, that fall within the scope of the federal Act. *See id.* at 22a; Appellant's Opening Brief at 26-27, *American Vantage Companies* v. *Table Mountain Rancheria*, 292 F.3d 1091 (9th Cir. 2002) (No. 00-17355); Appellant's Reply Brief at 14, *American Vantage Companies* (No. 00-17355). The court of appeals declined to consider that argument, because

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[5] The court also dismissed Table Mountain's counterclaims. The court concluded that IGRA creates no private right of action for violation of its terms, and it characterized the Band's claims as based either on state law or on the federal Declaratory Judgment Act, 28 U.S.C. § 2201, which did not provide an independent basis for jurisdiction. *Id.* at 15a-16a.

AVC had not advanced it in the district court—despite the opportunity that the district court had afforded AVC to reframe its jurisdictional allegations. *Id.* at 22a & n.11.

c. While its federal appeal was pending, AVC also filed suit in California Superior Court, raising essentially the same allegations concerning breach of the Termination Agreement and the Consulting Agreement. The Superior Court granted Table Mountain's motion to dismiss the state complaint. App., *infra*, 10a-12a. It concluded that AVC's claims essentially challenged the validity of the Band's decision to terminate gaming-related contracts; that IGRA completely preempts state law with respect to such matters; and that AVC's claims could be pursued only in federal court. *Id.* at 10a-11a.[6]

The California Court of Appeal reversed. App., *infra*, at 1a-9a. The court agreed that IGRA completely preempts state law claims that "concern the regulation of Indian gaming activities," transforming any such claim into one that arises under federal law. *Id.* at 6a (citing *Gaming Corp.* 88 F.3d at 547); *see id.* at 4a-6a. It also agreed that if IGRA preempted the claims at issue in this case, then the Superior Court did not have jurisdiction over the action. *Id.* at 7a. In the court's view, however, AVC's claims for breach of its purported termination and consulting agreements with Table Mountain were "state-law causes of action" (*id.* at 6a) that were not preempted by IGRA, *id.* at 6a-8a—despite the agreements' express recognition that they were to be governed by federal law, and despite Congress's stated intention to "expressly preempt the field" of Indian gaming under IGRA. S. Rep. No. 100-446, *supra*, at 6.

The Court of Appeal acknowledged that "IGRA [might] play a role in the resolution of this matter," because if "an examination of the relationship between the parties" showed

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[6] The Superior Court did not reach the Band's alternative argument that the purported waiver of the Band's sovereign immunity set out in the agreements was not properly authorized. *See* App., *infra*, 9a.

that "the consulting agreement is in reality an unapproved management agreement," then the agreement would be "void." App., *infra*, 6a-7a. Nonetheless, it reasoned that the NIGC had determined that neither the Termination Agreement nor the Consulting Agreement on its face required federal approval (*id.* at 6a), and that AVC's claim for money damages, as opposed to specific performance, would not "undermine Table Mountain's decision to terminate its business relationship with" AVC or "intrude on the [Band's] *control* of its gaming enterprise" (*id.* at 7a-8a). On that basis, the court concluded that the alleged contracts fell "outside . . . IGRA's protective structure" (*id.* at 6a), and that AVC's claims were not preempted by federal law.

The California Supreme Court denied discretionary review, with one Justice recused and one noting his dissent. App., *infra.*, 13a.

REASONS FOR GRANTING THE PETITION

AVC's claims that the Band breached a contract relating to the management of its gaming enterprise are completely preempted by the Indian Gaming Regulatory Act, and may be pursued only in federal court. Congress intended IGRA to have extraordinary preemptive force; and it intended that federal courts, applying federal law, would make determinations touching the management of Indian gaming. The California Court of Appeal's judgment cannot be reconciled with that intent or with other authority, and reflects confusion among the lower courts concerning the preemptive scope of IGRA. That confusion directly affects the operation of a federal law designed to protect Indian Tribes, and specifically intended to define jurisdictional boundaries in the traditionally sensitive area of inter-governmental relations among States, the Tribes, and the United States. The need for clarification is great, given the inevitability of disputes between Tribes and their gaming contractors, the rapid growth of the Indian gaming industry and the ease with which intended federal protections can be

avoided under reasoning such as that in the Court of Appeal's decision. The decision below accordingly warrants review by this Court.

I. IGRA COMPLETELY PREEMPTS THE FIELD OF INDIAN GAMING REGULATION.

A. Federal Law

This Court's cases have consistently made clear Congress's "plenary and exclusive power" over Indian affairs. *Bryan* v. *Itasca County*, 426 U.S. 373, 376 n.2 (1976); *see also*, *e.g.*, *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 234 (1985) ("Indian relations [are] the exclusive province of federal law"). In general, "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *See*, *e.g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332-336 (1983); *id.* at 334. Before the enactment of IGRA, this Court used just such an inquiry to conclude that federal law preempted an attempt by California to assert state regulatory jurisdiction over a tribal gaming enterprise. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987), *cert. denied*, 512 U.S. 1221 (1994).

After *Cabazon*, Congress determined that it was "the responsibility of the Congress, consistent with its plenary power over Indian affairs, to balance competing policy interests and to adjust, where appropriate, the jurisdictional framework for regulation of gaming on Indian lands." S. Rep. No. 100-446, *supra*, at 3. Having conducted that balancing, Congress enacted IGRA to "establish[] . . . Federal standards for gaming on Indian lands." 25 U.S.C. § 2702(3). In keeping with Congress's decision to create a comprehensive federal regulatory and jurisdictional scheme, IGRA was "intended to expressly preempt the field in the governance of gaming activities on Indian lands." S. Rep. No. 100-446, *supra*, at 6. In view of the jurisdictional lines

Congress itself drew in the new Act, "Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed." *Id.* Instead, IGRA would occupy the field of Indian gaming, and federal courts would make any determinations called for under the new federal regime. *See Gaming Corp. of America* v. *Dorsey & Whitney*, 88 F.3d 536, 544-545 (8th Cir. 1996) (noting IGRA's "exclusive focus on federal courts").

Under these circumstances, IGRA has been recognized as having "the requisite extraordinary preemptive force necessary to satisfy the complete preemption" doctrine. *See Gaming Corp.*, 88 F.3d at 547; *see also Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians*, 63 F.3d 1030, 1047 & n.59 (11th Cir. 1995); App., *infra*, 5a-6a. That doctrine recognizes that "Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 63-64 (1987). A completely preemptive federal law "'displace[s] entirely any state cause of action,'" and "convert[s]" any state claim that might otherwise lie into one that arises under federal law. *Id.* at 64 (quoting *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983)). *See generally Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 393-94 & n.8 (1987) (collecting cases); *Metropolitan Life*, *supra* (Employee Retirement Income Security Act of 1974); *Avco Corp.* v. *Aero Lodge No. 735, Int'l Ass'n of Machinists and Aerospace Workers*, 390 U.S. 557 (1968) (Labor Management Relations Act); *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974) (federal common law relating to Indian lands).

B. Federal Forum

Moreover, where, as here, there is a "clear incompatibility between state-court jurisdiction and federal interests," federal law requires that claims be adjudicated not

only under federal standards, but in a federal forum. *See Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). The factors relevant to determining such incompatibility include "the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims." *Id.* at 483-484; *see also Tafflin* v. *Levitt*, 493 U.S. 455, 464 (1990).

These factors all support the conclusion that IGRA provides for exclusive federal court jurisdiction over completely preempted claims related to Indian gaming. Achieving IGRA's stated purpose of establishing federal standards for Indian gaming and protecting Indian Tribes from corrupting influences requires that IGRA's regulatory scheme be interpreted and applied uniformly. That goal would be undermined by allowing state courts to adjudicate disputes over the operation of Indian gaming enterprises. Moreover, federal courts are far more likely than state courts to be familiar both with IGRA and with applicable principles of federal Indian law.

Finally, disputes between Indians and non-Indians are quintessential "peculiarly federal" claims, as to which federal courts are not only more expert but predictably more hospitable. *Gulf Offshore*, 453 U.S. at 483-484; *see Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 566-567 (1983) (recognizing that there is "a good deal of force" to the argument that "[s]tate courts may be in-hospitable to Indian rights"); *Oneida Indian Nation*, 414 U.S. at 678 (noting "recurring tension" resulting from state authorities' resistance to principle that "federal law and federal courts must be deemed the controlling considerations in dealing with the Indians"). Thus, for example, while ordinarily it takes "an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction," *Tafflin*, 493 U.S. at 469-470 (Scalia, J., concurring), under basic principles of Indian law, "State law, including judicial jurisdiction, is not applicable to Indian affairs within Indian lands absent the *consent* of

Congress." FELIX S. COHEN, FEDERAL HANDBOOK OF INDIAN LAW 259 (1982 ed.) (emphasis added); *see also Gaming Corp.*, 88 F.3d at 545 ("Every reference to court action in IGRA specifies federal court jurisdiction," and this "exclusive focus on federal courts" is consistent with "the larger jurisdictional framework of Indian law."). In these special circumstances, recognizing state court jurisdiction would be antithetical to the federal interests reflected in IGRA, including the federal government's special responsibility to protect Indian Tribes. *See Great Western Casinos, Inc.* v. *Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1425-1426 (1999), *cert. denied*, 531 U.S. 812 (2000) (holding that state law claims for wrongful termination of a contract to manage a Tribe's gaming operations are completely preempted by IGRA, and that the state court therefore lacked jurisdiction to adjudicate the claims); *cf. Musson Theatrical Inc.* v. *Federal Express Corp.*, 89 F.3d 1244, 1253 (6th Cir. 1996) (indicating that where complete preemption applies Congress intends "the federal courts to have exclusive subject matter jurisdiction over the preemption defenses to state law claims"); *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 925-926 (5th Cir. 1997) (same).[7]

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[7] The Court of Appeal agreed that where IGRA completely preempts state claims, "the state court does not have jurisdiction over the action." App., *infra*, 5a (*citing Great Western Casinos, Inc.*, 74 Cal. App. 4th at 1425-1426). The court's decision that a state trial court should nonetheless exercise jurisdiction over the claims at issue here, over the Band's objection that the claims must be pursued in federal court, constitutes a "final judgment[]" on these federal issues for purposes of 28 U.S.C. § 1257(a). *See Local No. 438 Constr. & General Laborers' Union AFL-CIO* v. *Curry*, 371 U.S. 542, 5449 (1963) (Court had jurisdiction under 28 U.S.C. § 1257 despite remand to state trial court for adjudication of state-law claims; federal question whether claims fall within exclusive jurisdiction of National Labor Relations Board was separate from the merits and ripe for review); *see also Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 483 (1975) (discussing *Local No. 438*

II. THE COURT OF APPEAL IMPROPERLY NARROWED IGRA'S PREEMPTIVE SCOPE.

A. IGRA Preempts State Claims Relating to Control of Tribal Gaming Operations

In order to fulfill Congress's intent that IGRA broadly preempt claims involving Indian gaming operations—and that federal courts, applying IGRA, adjudicate such claims—IGRA's preemptive scope must encompass claims that are integrally related to a Tribe's conduct or control of its gaming operations. The claims at issue here, which arise from the Band's decision to terminate a non-Indian contractor and reassert control over its gaming operation, meet that description. The Court of Appeal's decision deprives IGRA of its intended preemptive force in such cases.

In this case, the NIGC expressly found that AVC and its president were unsuitable to manage a tribal casino. AVC then prevailed on Table Mountain's then-Chairman to replace an existing but unapproved—and therefore void—management contract with two new agreements, which (i) transferred to AVC almost $17 million in tribal funds, in supposed exchange for the termination of contractual "rights" that the NIGC had already determined were unenforceable, and (ii) promised AVC tens of millions of dollars more, for performing "consulting" services that were essentially indistinguishable from the "management" services the NIGC had forbidden it to provide.

After a change in tribal leadership, precipitated in part by concern about the relationship between AVC and the former tribal Chairman, the Band sought to regain control of its gaming operations, and accordingly terminated its relationship with AVC. AVC sued for breach of contract. Applying its truncated version of the complete preemption

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Constr. as example of situation satisfying final judgment requirement of 28 U.S.C. § 1257).

doctrine, the Court of Appeal held that AVC's claims fell "outside . . . IGRA's protective structure" for three reasons: Because AVC had alleged "state law causes of action"; because the Band's argument that the purported agreements are void under IGRA was simply a federal "defense," which in the court's view somehow meant that the alleged agreements were "not subject to IGRA regulation"; and because AVC's claim for more than $15 million in damages, rather than for reinstatement of its position under the alleged contract, would not "intrude on the [Band's] *control* of its gaming enterprise." App., *infra*, 6a-8a. None of those arguments is tenable.

To begin with, it is far from clear that AVC's complaint can properly be read to allege "state law causes of action for breach of contract." *Id.* at 6a. To the contrary, the very writings on which AVC relies make clear the parties' understanding and intent that any dispute would be "governed by the laws of the United States." *See* p. 7, *supra*. Moreover, under IGRA, the question whether the contracts at issue here are enforceable is a matter of federal law. *See* p. 4, *supra*; *cf. United States ex rel. Bernard* v. *Casino Magic*, 293 F.3d 419, 425 (8th Cir. 2002) (question whether contract was a "management contract" under IGRA turned on whether contract and related agreements "served as a management contract implicitly if not explicitly," the key issue being "whether [the contractor], in fact, had managerial control" as defined by IGRA and the NIGC's regulations). But even if the complaint on its face raised only state-law claims, to which the Band's arguments under IGRA would normally present only a federal defense, those circumstances are precisely the ones in which the complete preemption doctrine operates—*converting* what would normally be a state cause of action into a federal one. *See, e.g., Metropolitan Life Ins. Co.*, 481 U.S. at 64.

Nor is there any force to the court's assertion that a claim for more than $15 million in damages for an alleged breach of contract would not "undermine Table Mountain's

decision to terminate its business relationship with" AVC, or "diminish Table Mountain's control over its gaming operation." App., *infra*, 8a. Potential actions posing the threat of enormous money damages must be preempted if IGRA is to provide Indian Tribes with the meaningful federal protection the Congress clearly intended. That is especially true of claims like AVC's, which are based on Table Mountain's decision to reclaim control of its gaming enterprise from a management company that the NIGC had already found to pose the very dangers of "unsuitable" management that IGRA was designed to prevent. This conclusion does not depend on whether a particular arrangement is properly characterized as involving "management" or simply "consulting": As is clear from its exceptionally detailed regulation of all matters touching on the operation of a gaming enterprise, IGRA is intended to occupy the entire field of gaming management, including relations between Tribes and non-Indian advisers.[8] The Court of Appeal's narrow view of IGRA's preemptive scope will frustrate Congress's intent to provide federal standards and a federal forum to adjudicate disputes over Indian gaming.

B. IGRA Preempts State Claims Where the Dispute Turns On Legal Conclusions Under IGRA

The error in the Court of Appeal's approach is particularly clear where, as in this case, the dispute at issue

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[8] *See, e.g., Sam L. Majors Jewelers.*, 117 F.3d at 925 (noting that a federal regulatory regime may be "so extensive and comprehensive that it is possible to infer that Congress intended any related cause of action to be governed under federal law"). IGRA's detailed regulatory regime is outlined briefly at pp. 4-5 & nn. 2-3, *supra*. *See generally* 25 U.S.C. §§ 2710(b), (d) (describing extensive regulation of Class II gaming, including regulation of tribal ordinances, licensing, audits, background investigations, and environmental and public health and safety regulation); 25 U.S.C. § 2706 (detailing the NIGC's duty to monitor gaming on a continuing basis, including inspection of gaming premises, inspection and audit of gaming records, and promulgation of regulations and guidelines to implement IGRA's provisions).

not only relates to a Tribe's control of its gaming operation, but turns on legal conclusions *under IGRA*. The Court of Appeal apparently realized the dispositive force of IGRA in this case. App., *infra*, 6a-7a. It nonetheless reasoned that *whether or not* the alleged contracts between AVC and the Band amounted to a "management" arrangement that was *void* under IGRA, AVC's claims should be remanded to state court because the contracts were somehow "not subject to IGRA regulation." *Id.* at 6a. Particularly in view of the court's acknowledgement of IGRA's completely preemptive force, there is no way to make sense out of that conclusion.

In *Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians*, the Eleventh Circuit concluded that a breach of contract claim brought by a gaming management company against a Tribe arose under federal law. 63 F.3d at 1047. In that case, the Tribe had denied the management company a gaming license, and the company alleged that the license was denied in bad faith for the "sole purpose" of ousting Tamiami Partners as managers of the Tribe's gaming enterprise. *Id.* The court reasoned that a management contract "incorporates—by operation of law if not by reference—the provisions of IGRA and the NIGC's regulations that govern [a tribal gaming enterprise's] operations." *Id.* Because resolution of the claim would require the interpretation of these provisions under IGRA, the claim "aris[es] under" federal law. *Id.*

In a later decision arising out of the same set of disputes, the Eleventh Circuit reaffirmed that decision in the context of a federal suit to compel arbitration, concluding that Tamiami's demand for arbitration presented a federal question, because it required the court to interpret IGRA and its implementing regulations governing Indian gaming licensing procedures. *Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians*, 177 F.3d 1212, 1222-1223 (11th Cir, 1999), *cert. denied*, 529 U.S. 1018 (2000); *see also Bruce H. Lein Co.* v. *Three Affiliated Tribes*, 93 F.3d 1412, 1421-1422 (8th Cir. 1996) (sustaining federal jurisdiction over contract and

arbitration dispute between Tribe and gaming contractor, in part because "aspects" of the dispute raised federal questions, "[p]articularly where the entire association between the parties (and their various disputes) arise under IGRA"); *Tom's Amusement Co.* v. *Cuthbertson*, 816 F. Supp. 403, 406 (W.D.N.C. 1993) (asserting federal jurisdiction over contract dispute between gaming contractor and non-Indian supplier, in part because "[t]he interpretation of contractual provisions involving gaming establishments" subject to IGRA "involves federal question issues"). Similarly, the question whether a management contractor is evading IGRA by unlawfully providing "management" services under the guise of a "consulting" contract, or whether the totality of the contractual relationship constitutes a de facto management contract under IGRA, can only be determined by interpreting and applying federal law.

III. THE DECISION BELOW REFLECTS CONFLICT AND UNCERTAINTY IN THE LOWER COURTS.

A. The *Gaming Corporation* Approach

The Court of Appeal's decision cannot be reconciled with the approach to IGRA preemption adopted by the Eighth Circuit in *Gaming Corporation*, which recognized that any claim that would interfere with a Tribe's ability to control its own gaming operations should fall within IGRA's preemptive scope. *See* 88 F.3d at 549. *Gaming Corporation* considered claims brought by a gaming contractor against a Tribe's law firm, alleging that the firm had wrongfully interfered with a tribal licensing process. *See id.* at 540. After analyzing the issue at some length and concluding that IGRA completely preempted some state-law claims (*id.* at 543-548), the court turned to consider the scope of that preemption (*id.* at 548-550).

Focusing on the statement in IGRA's legislative history that Congress intended to "expressly preempt the field in the governance of gaming activities on Indian lands" (*id.* at 548, quoting S. Rep. No. 100-446, *supra*, at 6), the court

concluded that "[t]he key question is whether a particular claim will interfere with tribal governance of gaming." *Id.* at 549. Pointing out that a Tribe "has a great interest in not having its decisions questioned by the tribunal of another sovereign," the court explained that, in general, gaming management companies should not have "the right to use state law to challenge the outcome of an internal governmental decision" reached by a Tribe. *Id.* In particular, the court explained that claims completely preempted by IGRA would likely include any "that would intrude on the tribe's regulation of gaming," or even "require examination of the relationship" between the Tribe *and its lawyers* (*id.* at 550 (emphasis added))—even though the claims at issue in that case were brought by the gaming manager against the lawyers, not against the Tribe itself.[9]

The relationship between a Tribe and its gaming contractor is even more clearly related to the Tribe's conduct of its gaming operations. Accordingly, any examination of that relationship—in this case, for example, whether the Band sought to wrest control of its gaming operation from a management company already found to be "unsuitable" by the NIGC, or whether that company was providing management services—is even more clearly within IGRA's field of preemption. *See Abdo* v. *Fort Randall Casino*, 957 F. Supp. 1111, 1114 (D.S.D. 1997) (preemptive scope of IGRA encompasses claims involving tribe's "relationship with agents" hired to assist in the process of regulated gaming; a dispute over whether a contract is in fact a consulting agreement or a management agreement is completely preempted) (citing *Gaming Corp.*, 88 F.3d, at 550)); *Calvello* v. *Yankton Sioux Tribe*, 899 F. Supp. 431,

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[9] By contrast, as an example of "[p]otentially valid claims under state law" that "would not interfere with the nation's governance of gaming," the court cited "a count alleg[ing] a violation of a duty owed [by the defendant lawyers directly] to one of the management companies[.]" *Id.*

435 (D.S.D. 1995) (asserting federal jurisdiction over dispute concerning whether contract was an employment contract or an IGRA management contract); *but see Iowa Mgmt. & Consultants* v. *Sac & Fox Tribe*, 207 F.3d 488, 489 (8th Cir. 2000) (discussed below).

The decision below cannot be squared with the view, shared by these federal courts, that IGRA provides federal standards, and a federal forum, for the adjudication of disputes between an Indian Tribe and a non-Indian gaming contractor over the conduct of Indian gaming. Any contractual dispute relating to a Tribe's conduct or control of its gaming operations is completely preempted under IGRA.

B. Uncertainty Over IGRA's Preemptive Scope

There is also a lack of clear guidance in the case law even on the narrower question whether a dispute focused specifically on the nature and validity of a contract between a Tribe and a non-Indian contractor is within IGRA's preemptive scope. In *Iowa Management & Consultants*, for example, a gaming contractor sued a Tribe in federal court, seeking to compel arbitration of a dispute under a "consulting" agreement. 207 F.3d at 489. With little analysis, the court of appeals agreed with the defendant Tribe that the suit was "a routine contract action . . . over which federal courts do not have jurisdiction," despite the plaintiff's suggestion that the Tribe was likely to defend in part on the ground that the purported contract was void, under IGRA, as a management contract that had not been approved by the NIGC. *Id.*; *cf. Missouri ex rel. Nixon* v. *Coeur D'Alene Tribe*, 164 F.3d 1102, 1109 (8th Cir. 1999), *cert. denied*, 527 U.S. 1039 (1999) (remanding to state court to determine whether property was Indian land, because IGRA does not preempt state regulation of gaming on non-Indian lands).

Judge Bright dissented, arguing in part that "management agreements for gaming operations . . . incorporate the terms of the IGRA by operation of law," so that "disputes arising under such management agreements are

disputes arising under the laws of the United States[.]" *Id.* at 490 (Bright, J., dissenting); *see also Gaming World Int'l, Ltd.* v. *White Earth Band of Chippewa Indians*, 317 F.3d 840, 846, 848 (8th Cir. 2003) (distinguishing *Iowa Management*; claim that management contract was never approved by NIGC invokes federal jurisdiction because it is not a "routine contract action," but "raise[s] issues of federal law" under IGRA's "regulatory scheme"). Judge Bright's dissent in *Iowa Management* relied on the Eleventh Circuit's decision in *Tamiami Partners, Ltd.*, 63 F.3d at 1047, discussed above, which also recognized the breadth of federal jurisdiction under IGRA. *Cf. Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050, 1055-1056 (9th Cir. 1997) (claim for enforcement of provision of IGRA Compact arises under federal law even if there would be no federal jurisdiction over "run-of-the-mill contract claims brought by Indian Tribes"); s*ee also Bruce H. Lein Co.*, 93 F.3d at 1421-1422 (contract claims arose under federal law in part because "entire association between the parties" arose under IGRA); *Tom's Amusement Co.*, 816 F. Supp. at 406 (contract claims arose under federal law in part because the interpretation of contractual provisions involving gaming establishments is subject to IGRA).

The decision below reflects this confusion over the proper scope of preemption under IGRA. Without intervention by this Court, the lack of clear authority will present a recurring obstacle to the efficient and uniform administration of Indian gaming. *See, e.g.*, Petition for a Writ of Certiorari in *Sac & Fox Tribe of the Mississippi in Iowa* v. *Iowa Mgmt. & Consultants, Inc.*, No. 02-1563 (docketed April 29, 2003) (also raising question whether IGRA completely preempts state court jurisdiction over a dispute concerning the nature and validity of a contract between a Tribe and a non-Indian casino management company).

IV. THIS COURT SHOULD PROVIDE DEFINITIVE GUIDANCE.

The need for authoritative guidance in this area is particularly pressing for at least two reasons. First, decisions like that entered by the Court of Appeal in this case allow non-Indian contractors to frustrate IGRA's comprehensive regulatory scheme, and Congress's purpose of providing federal protection to gaming Tribes, simply by styling their gaming contracts as "consulting agreements." The NIGC's Inspector General has recognized this problem, noting that "[a]lmost all tribes are utilizing consulting agreements to circumvent the regulatory and enforcement authority vested in the [NIGC]." Donald L. Bartlett & James B. Steele, *Special Report: Indian Casinos*, TIME MAGAZINE, Dec. 16, 2002, at 48. The decision below encourages such circumvention, by permitting adjudication of contract disputes involving such arrangements to be diverted from the federal courts to state courts, and to be decided under state contract law rather than under the supervening federal standards that Congress intended would apply under IGRA. *See* App., *infra*, 6a-8a. Congress instead intended that IGRA, applied by the NIGC or federal courts, should provide the exclusive framework for governing virtually every aspect of Indian gaming. *See, e.g.*, 25 C.F.R. § 502.5 (providing for jurisdiction over any contract that "is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe . . . and a management contractor"). Disputes between Tribes and their gaming contractors over such issues are common, and the jurisdictional problems they raise are accordingly both varied and recurrent. Clarifying the proper jurisdictional framework for the resolution of these disputes is a matter of great and growing importance, particularly in view of the rapid growth of the tribal gaming industry, which in fiscal 2001 produced net revenue of almost $13 billion. *See* [http://www.nigc.gov/nigcControl?option=TRIBAL_REVENUE.].

Second, the issues raised by this case implicate the traditionally sensitive—and uniquely federal—area of relations among the Nation's federal, state, and tribal governments. As the *Gaming Corporation* decision explains, legal issues relating to tribal gaming must be evaluated in the special context of Indian law as a whole. *See* 88 F.3d at 547-548. Not only are "Indian relations the exclusive province of federal law," *Oneida Indian Nation*, 470 U.S. at 234, but the federal government's special trust relationship with Indian Tribes gives Congress "controlling authority . . . in respect to the care and protection of the Indians." *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564 (1903). The question whether contract disputes between Tribes and private contractors over the management and control of tribal gaming enterprises should be resolved by state courts as a matter of ordinary state-law litigation, or by federal courts applying federal law (including IGRA itself), must be determined in the context of this special federal responsibility for Indian Tribes. *See Gaming Corp.*, 88 F.3d at 547 ("traditional notions of Indian sovereignty provide a crucial backdrop against which any assertion of state authority must be assessed") (*citing White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 1443 (1980)).

As *Gaming Corporation* recognized, the statement in IGRA's legislative history that the Act was "intended to expressly preempt the field" of Indian gaming "demonstrates the intent of Congress that IGRA have extraordinary preemptive power, both because of its broad language and because it demonstrates that Congress foresaw that it would be federal courts which made determinations about gaming." 88 F.3d at 544-545. This case and others like it demonstrate that "determinations about gaming" (*id.*) include, importantly, determinations with respect to disputes between Tribes and non-Indian contractors over the management and control of tribal gaming enterprises. In this context Congress has already struck its own balance among federal, state, and tribal interests—and that balance completely preempts the

ordinary application of state law to contracts or other matters relating to the conduct of Indian gaming.

The decision of the California Court of Appeal in this case denies the preemptive force of IGRA in a wide category of cases in which disputes between a Tribe and a gaming contractor are integrally related to the Tribe's conduct or control of its gaming operations. That decision deprives Table Mountain, and will deprive other Tribes, of the federal right to have preemptive federal law applied in a federal forum. It merits further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JUNE 2003

APPENDICES

APPENDIX A

CALIFORNIA COURT OF APPEAL,
FIFTH APPELLATE DISTRICT

No. F038121

AMERICAN VANTAGE COMPANIES,
Plaintiff and Appellant,
v.
TABLE MOUNTAIN RANCHERIA,
Defendant and Respondent.

November 7, 2002
[103 Cal. App. 4th 590]

LEVY, J.

Appellant, American Vantage Companies, challenges the dismissal of its complaint for breach of contract filed against Table Mountain **[593]** Rancheria (Table Mountain), a federally recognized Indian tribe. The trial court concluded that the complaint was completely preempted by federal law, specifically the Indian Gaming Regulatory Act (IGRA), in that appellant's claims threatened to directly affect or interfere with the tribe's gaming operations.

With respect to the regulation of Indian gaming activity, the IGRA completely preempts state law. However, as discussed below, appellant's claims fall outside the parameters of IGRA regulation. Accordingly, the trial court erred in granting Table Mountain's motion to dismiss for lack of state court jurisdiction.

STATEMENT OF THE CASE AND FACTS

Table Mountain retained appellant, a Nevada corporation, in 1990 to supervise the development and operation of Table Mountain's casino. Between 1990 and 1993, appellant and Table Mountain entered into various management contracts. As a non-Indian contractor, appellant was required to secure the National Indian Gaming Commission's (NIGC) approval before it could manage all or part of Table Mountain's casino pursuant to these contracts. (25 U.S.C. § 2711(a).)

In 1994 the NIGC initiated an enforcement action against appellant. According to the NIGC, the original management contract improperly delegated gaming authority to appellant. In 1996, appellant, Table Mountain and the NIGC resolved this matter and entered into a settlement agreement. As part of this settlement, appellant acknowledged that it had participated in decisionmaking at the casino and agreed to pay a $500,000 fine. Further, appellant agreed to terminate the existing management contract and to enter into a termination agreement and a consulting agreement with Table Mountain.

The termination agreement, executed contemporaneously with and as part of the settlement agreement, cancelled the existing management contract in exchange for a payment of $16.8 million. It also included a provision that waived Table Mountain's sovereign immunity for purposes of implementing and enforcing this agreement.

The second contract executed pursuant to the settlement, the consulting agreement, obligated appellant to provide technical assistance, training and advice to Table Mountain in the operation of its gaming activities in exchange for a monthly fee. Again, Table Mountain agreed to waive sovereign immunity for enforcement purposes. The NIGC reviewed both agreements and determined that they did not require NIGC approval. As noted by **[594]** the NIGC, the

IGRA limits its authority to management contracts and collateral agreements to management contracts.

Vern Castro, Table Mountain's chairman, executed both of these agreements on behalf of the tribe. However, in 1998 the "General Council" ousted Castro in a recall election. The new chairperson assumed physical control of the tribal office in May 1999. Shortly thereafter, Table Mountain notified appellant that it was terminating the contracts and that no further payments would be made.

In June 1999, appellant filed a complaint for breach of contract in the United States District Court.[1] Appellant asserted federal jurisdiction based on diversity. In response, Table Mountain filed an answer and compulsory counterclaims. Table Mountain took the position that the court had "federal question" subject matter jurisdiction over the dispute in that it involved the validity of certain contracts between an Indian tribe and a non-Indian party.

The district court dismissed the case for lack of subject matter jurisdiction. The court concluded diversity could not serve as a basis of jurisdiction because a tribe is not a citizen of any state for that purpose.[2] With respect to Table Mountain's counterclaims, the court determined that they did not arise under the laws of the United States. Rather, all of the claims for relief advanced by Table Mountain were based on state law.

Thereafter, appellant filed the underlying complaint against Table Mountain in the superior court seeking damages for breach of both the termination agreement and the consulting agreement. In response, Table Mountain

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[1] Table Mountain's request for this court to take judicial notice of the federal complaint and related documents filed September 26, 2001, is granted.

[2] The Ninth Circuit Court of Appeals recently affirmed this ruling (*American Vantage* v. *Table Mountain Rancheria*, (9th Cir. 2002) 292 F.3d 1091.

moved to quash/dismiss the complaint on jurisdictional grounds. Since the dispute involved Indian gaming, Table Mountain argued that it was completely preempted by federal law. Table Mountain further asserted that it had not waived its sovereign immunity.

The trial court granted Table Mountain's motion. In the court's opinion, appellant's claims essentially questioned the validity of the tribe's decision to terminate gaming related contracts. Accordingly, whether appellant acted as a manager or not, the contracts themselves related to the governance of Table Mountain's gaming activities. Consequently, the court found appellant's claims were completely preempted by the IGRA. **[595]**

DISCUSSION

Generally, a plaintiff can avoid federal jurisdiction by relying exclusively on state law. (*Caterpillar Inc.* v. *Williams*, (1987) 482 U.S. 386, 392 [107 S.Ct. 2425, 2429, 96 L.Ed.2d 318].) Absent diversity of citizenship, the presence or absence of federal question jurisdiction is governed by the "'well-pleaded complaint rule,'" i.e., federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. (*Ibid.*)

However, on occasion the preemptive force of a statute is so extraordinary that it "'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" (*Caterpillar Inc.* v. *Williams*, *supra*, 482 U.S. at p. 393 [107 S.Ct. at p. 2430].) Under this exception, known as the complete preemption doctrine, any claim purportedly based on the preempted state law is considered, from its inception, to be a federal claim and therefore arises under federal law. (*Ibid.*)

Appellant first raises a procedural issue with respect to the use of the complete preemption doctrine in state court. According to appellant, complete preemption can be properly invoked only in federal court to determine federal removal

jurisdiction. Therefore, appellant argues, the trial court could not properly dismiss the complaint on this ground.

However, if the complete preemption doctrine applies, the state court does not have jurisdiction over the action. Although generally such a matter would be removed to the federal court, it does not follow that such a result is required. Here the federal court had already found that it lacked subject matter jurisdiction. Consequently, once the trial court determined that it too lacked jurisdiction, dismissal was its only logical choice.

The IGRA provides a comprehensive scheme for regulating gaming on Indian lands. (*Great Western Casinos, Inc.* v. *Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1425 [88 Cal.Rptr.2d 828].) It establishes federal gaming standards and leaves the states without a significant role unless one is negotiated through a tribal-state compact. (25 U.S.C. § 2702(3); *Gaming Corp. of America* v. *Dorsey & Whitney* (8th Cir. 1996) 88 F.3d 536, 547.)

The NIGC, a federal commission established by the IGRA, oversees regulation, licensing, background checks of key employees, and other facets of gaming. (*Gaming Corp. of America* v. *Dorsey & Whitney*, *supra*, 88 F.3d at p. 544.) It is the NIGC that must approve license applications, management **[596]** contracts, and tribal gaming ordinances. (*Ibid.*) However, even if the NIGC originally determines that a contract does not require its approval, the NIGC may thereafter reconsider its decision. When, based on an examination of the relationship of the parties and the IGRA, the NIGC finds de facto management under an unapproved agreement, it has the authority to institute an enforcement action.

Based on its text and structure, legislative history and jurisdictional framework, the IGRA has been construed as having the requisite extraordinary preemptive force necessary to satisfy the complete preemption exception to the well-pleaded complaint rule. (*Gaming Corp. of America* v.

Dorsey & Whitney, *supra*, 88 F.3d at p. 547.) Thus, claims that fall within the preemptive scope of the IGRA, i.e., those that concern the regulation of Indian gaming activities, are considered to be federal questions.

However, not every contract between a tribe and a non-Indian contractor is subject to the IGRA. (*Iowa Management & Consultants* v. *Sac & Fox Tribe* (8th Cir. 2000) 207 F.3d 488, 489; *Calumet Gaming Group-Kansas* v. *Kickapoo Tribe* (D.Kan. 1997) 987 F.Supp. 1321, 1325.) Rather, IGRA regulation of contracts is limited to management contracts and collateral agreements to management contracts. (25 U.S.C. § 2711.)

As noted above, appellant's complaint alleges state law causes of action for breach of contract and seeks money damages as a remedy. Further, the NIGC determined that neither the termination agreement nor the consulting agreement required the approval of the NIGC chairman. Thus, based on the contracts' present status, i.e., they have not been further interpreted by the NIGC, it must be concluded that the contracts fall outside the IGRA's protective structure.

Table Mountain alleges that the consulting agreement is in reality an unapproved management agreement and therefore is void. At this point it is unknown whether Table Mountain will be able to prove this defense. Such a determination will require an examination of the relationship between the parties. Once those facts are ascertained in the trial court, they will determine the character of the contract under the IGRA. However, there are only two possible outcomes. The contract will be found to be either a consulting agreement or a void management agreement. Nevertheless, either characterization leads to the same result. The contract is not subject to IGRA regulation. (25 U.S.C. § 2711; *Gallegos* v. *San Juan Pueblo Business Dev. Bd. Inc.* (D.N.M. 1997) 955 F.Supp. 1348, 1350.) Thus, although the IGRA may play a role in the resolution of this matter, it does

not preempt **[597]** appellant's claims. Rather appellant's remedy, if any, for the alleged breach will be based on California law.

Relying on *Great Western Casinos, Inc.* v. *Morongo Band of Mission Indians*, *supra*, 74 Cal.App.4th 1407, Table Mountain argues otherwise. Table Mountain points to the court's comment that "federal courts have exclusive jurisdiction to review issues involving Indian gaming activities." (*Id.* at p. 1426.)

In *Great Western Casinos, Inc.*, the causes of action all related to the Morongo Band's allegedly wrongful termination of plaintiff's contract to manage the tribe's gaming operations. Such management contracts are subject to the IGRA. (*Gaming Corp. of America* v. *Dorsey & Whitney*, *supra*, 88 F.3d at p. 544.) Thus, the *Great Western* court's holding that the state trial court lacked jurisdiction over that particular lawsuit was correct. However, the court stated the IGRA preemption rule too broadly.

In *Gaming Corp. of America* v. *Dorsey Whitney*, *supra*, 88 F.3d 536, the Eighth Circuit Court of Appeals extensively analyzed the scope of federal preemption over Indian gaming activities. The court concluded that "[t]hose causes of action which would interfere with the nation's ability to govern gambling should fall within the scope of IGRA's preemption of state law." (*Id.* at p. 550.) Potentially valid state claims are those that would not interfere with the nation's governance of gaming. (*Ibid.*) Thus, to be preempted, the claim must do more than *involve* Indian gaming activities. The claim must intrude on the tribe's *control* of its gaming enterprise. Accordingly, appellant's claims must be analyzed in this context.

As noted above, appellant's claims are based on alleged breaches of contracts that the NIGC determined did not require the NIGC chairman's approval. Further, appellant is not requesting that Table Mountain be compelled to reinstate the consulting contract. Rather, appellant is seeking money

damages only. Thus, appellant's claim does not attempt to undermine Table Mountain's decision to terminate its business relationship with appellant. Consequently, it does not diminish Table Mountain's control over its gaming operation.

Table Mountain counters this argument by noting that appellant is seeking "enormous" money damages. Table Mountain then reasons that this "princely sum ... would no doubt adversely impact the operations of the Tribe's only economic asset, and shape the Tribe's current and future conduct with respect to the operation of its casino." However, Table Mountain is equating profitability with control. If appellant were awarded the **[598]** requested damages, the claim would undoubtedly decrease Table Mountain's net profits. Nevertheless, Table Mountain's ability to autonomously govern its gaming operation would remain intact.

Table Mountain poses an alternative ground for affirming the trial court's dismissal of appellant's complaint. Table Mountain notes that, as a federally recognized Indian tribe, it possesses the common law immunity from suit traditionally enjoyed by sovereign powers. (*Great Western Casinos, Inc.* v. *Morongo Band of Mission Indians*, *supra*, 74 Cal.App.4th at p.1419.) Table Mountain acknowledges that such immunity can be waived and that the contracts at issue purport to do so. Nevertheless, Table Mountain argues that these particular waivers were ineffective.

A judgment that is correct under an applicable legal theory will not be reversed merely because the trial court followed an erroneous path of reasoning. (*Cline* v. *Yamaga* (1979) 97 Cal. App.3d 239, 246 [158 Cal.Rptr. 598]). However, where the theory rests on determinations of fact, the evidence on the facts is conflicting, and the conflicts were not resolved by the trial court's express or implied findings, an appellate court will not employ that theory to affirm the judgment. (*Id.* at p. 247.)

Here, the trial court did not make a final ruling on the immunity issue. Rather, the court dismissed the complaint solely on jurisdictional grounds. No factual findings were made on the validity of the waivers. Further, appellant strongly disagrees with Table Mountain's claim that the evidence is not in dispute. Appellant additionally notes that discovery is incomplete. Under these circumstances, it is not appropriate for this court to affirm the judgment on sovereign immunity grounds. Rather, this is an issue to be resolved by the trier of fact.

DISPOSITION

The judgment is reversed. Costs on appeal are awarded to appellant.

Ardaiz, P. J., and Dibiaso, J., concurred. **[599]**

Cal.App.5.Dist.,2002.

AMERICAN VANTAGE COMPANIES, Plaintiff and Appellant, v. TABLE MOUNTAIN RANCHERIA, Defendant and Respondent.

APPENDIX B

SUPERIOR COURT OF CALIFORNIA
COUNTY OF FRESNO
CENTRAL DIVISION

No. 00 CE CG 11542

AMERICAN VANTAGE COMPANIES, INC.,
Plaintiff,
v.
TABLE MOUNTAIN RANCHERIA,
Defendant.

[Filed April 10, 2001]

ORDER GRANTING DEFENDANT'S
MOTION TO QUASH/DISMISS
COMPLAINT FOR LACK OF JURISDICTION

On April 4, 2001, defendant Table Mountain Rancheria's Motion to Quash/Dismiss Complaint for Lack of Jurisdiction came on regularly for hearing in Department 98A of the above-entitled court. The Court had previously considered the papers filed in support of and in opposition to the motion. The Court heard and considered oral argument and took the matter under submission.

It appears that plaintiff's claims are completely preempted by federal law, namely the Indian Gaming Regulatory Act (the "IGRA"), 25 U.S.C. section 2701 et seq. The Court of Appeal in *Great Western Casinos, Inc.* v. *Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, held that "[b]ased on Congress's statement of purpose and the act's comprehensive regulatory scheme, courts which have considered the question conclude federal courts have

exclusive jurisdiction to review issues involving Indian gaming activities." (*Id.* at 1425.) The court's language was broad, indicating that it believed that the IGRA completely preempts state court jurisdiction over any claims based on issues involving Indian gaming activities. In the case at bar, the contracts at issue both involve issues involving Indian gaming activities, since the contracts deal with the termination of American Vantage's allegedly managerial relationship with Table Mountain and the formation of a consulting relationship regarding the operation of Table Mountain's casino. Regardless of whether American Vantage acted as a manager of the gaming operations either before or after the formation of the contracts at issue, it is this Court's opinion that the contracts themselves relate to the governance of Table Mountain's gaming activities. The Federal Court of Appeals in *Gaming Corporation of America* v. *Dorsey & Whitney* (1996) 88 F.3d 536, stated that "[t]he key question is whether a particular claim will interfere with tribal governance or gaming . . . Any claim which would directly interfere with a tribe's ability to conduct its own licensing process should fall within the scope of complete preemption." (*Id.* at 549.) In the present case, American Vantage's claims essentially question the validity of the tribe's decision to terminate contracts related to its gaming operations. Consequently, American Vantage's claims threaten to directly affect or interfere with Table Mountain's ability to conduct its gaming operations, and therefore the IGRA completely preempts American Vantage's claims.

This Court is cognizant of the Federal District Court's decision in the "essentially identical" federal case filed by American Vantage. The Court hereby takes judicial notice of Judge Ishii's ruling dismissing that action for lack of subject matter jurisdiction. However, the federal court's ruling in that action does not mean that American Vantage has the right to bring an action in state court. As the Federal Court of Appeals stated in *Dorsey*, *supra*, 88 F.3d 536, "The issue of whether complete preemption exists is separate from the

issue of whether a private remedy is created under a federal statute." [Citations omitted]. Complete preemption can sometimes lead to dismissal of all claims in a case. Although courts may be reluctant to conclude that Congress intended plaintiffs to be left without recourse, [citations omitted] the intent of Congress is what controls (*Id.* at 547.) Here, the authorities support a finding of complete preemption, regardless of whether there is a separate private right of action under IGRA.

Defendant's Motion to Dismiss is granted.

Dated this 10 day of April, 2001.

/s/ STEPHEN J. KANE
Judge of the Superior Court

APPENDIX C

SUPREME COURT OF CALIFORNIA

En Banc

S112100

AMERICAN VANTAGE COMPANIES,
Plaintiff and Appellant
v.
TABLE MOUNTAIN RANCHERIA,
Defendant and Respondent,

[Filed March 5, 2003]

California Court of Appeal, Fifth Appellate District - No. F038121

Petition for review DENIED.

Baxter, J., was recused and did not participate.

Moreno, J., is of the opinion the petition should be granted.

GEORGE
Chief Justice

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CV F 99-5826

AMERICAN VANTAGE COMPANIES, INC.
Plaintiff and Counter-Defendant
v.
TABLE MOUNTAIN RANCHERIA,
Defendant and Counter-Claimant.

[Filed September 27, 2000]

ORDER

I. INTRODUCTION

American Vantage Companies, Inc. ("American Vantage"), a Nevada corporation, has sued Table Mountain Rancheria ("Table Mountain"), a federally-recognized Indian tribe located in Fresno County, California. American Vantage alleges that Table Mountain breached certain contracts under which American Vantage was to provide services related to Table Mountain's gaming operations at the Table Mountain Casino in Friant, California when it refused to make payments on these contracts, allegedly without cause and in repudiation of the contracts. In addition, American Vantage seeks repayment of amounts allegedly due under a promissory note that American Vantage states Table Mountain executed in favor of American Vantage. The complaint states that this court has jurisdiction over this case pursuant to 28 U.S.C. section 1332 (diversity) because the amount in controversy exceeds $75,000.00, American Vantage is a Nevada corporation with its principal place of business in Nevada, and Table Mountain "resid[es] in Fresno County, California."

Table Mountain has counterclaimed, asserting claims for declaratory relief, rescission, reimbursement, breach of contract, conversion, breach of fiduciary duty, and unfair business practices. By its first amended counterclaims Table Mountain also adds a new party as counterdefendant: American Vantage CEO Ronald Tassinari. In its first amended counterclaims, Table Mountain states that the court's jurisdiction is "founded on 28 U.S.C. §§ 1331 and 1362 in that a substantial part of the action purportedly involves the validity of certain contracts between an Indian tribe, Table Mountain, and a non-Indian party, American Vantage." Table Mountain alleges that the contracts at issue are governed by 25 U.S.C. section 81 and the Indian Gaming Regulatory Act, 25 U.S.C. section 2701 *et seq.* ("IGRA"). (*See* First Amended Counterclaims at 1:13-19.) Therefore, Table Mountain contends, the court has "federal question" subject matter jurisdiction over this dispute.

American Vantage has moved for summary judgment or in the alternative summary adjudication on the ground that enforceable contracts exist and have been breached by Table Mountain, and there are no valid defenses. (*See* Doc. 32.) Table Mountain has cross-moved for summary judgment in response, arguing that (1) the contracts at issue are illegal and therefore void; and (2) it enjoys sovereign immunity from suit as an Indian tribe. (*See* Doc. 43.) The court has not ruled on these cross-motions for summary judgment. Instead, by order dated February 28, 2000 the court dismissed both the complaint and the first amended counterclaims, stating that "there is no valid statutory basis for subject matter jurisdiction" and the court therefore "lacks the power to hear this dispute." (February 28, 2000 Order Dismissing Complaint and First Amended Counterclaims ("Dismissal Order"), Doc. 88 at 2:14-16 (footnote omitted).)

Dismissal of the complaint was based on the principle that the federal diversity jurisdiction statute, 29 U.S.C. section 1332, "cannot serve as a basis for subject matter jurisdiction in federal court in a case in which an Indian tribe

is a party, because a tribe is not a citizen of any state for purposes of diversity jurisdiction." (*Id.* at 3:8-10 (citations omitted).) Dismissal of Table Mountain's first amended counterclaims was premised on the fact that none of the statutes cited by Table Mountain as grounds for federal court jurisdiction purports to create such jurisdiction in a case between a tribe and a corporation with which it does business, and all but one of Table Mountain's claims for relief–a claim for a declaratory judgment that the contracts at issue were and are illegal–are based on state (as opposed to federal) law. As to the claim for a declaratory judgment of contract illegality, the court noted that it is settled law that the federal Declaratory Judgment Act "only creates a remedy and is not an independent basis for jurisdiction." (*Id.* at 5:19-20 (quoting *Stock West, Inc.* v. *Confederated Tribes*, 873 F.2d 1221,1225 (9th Cir. 1989) (citation omitted)).)

The Dismissal Order permitted either of the parties to request leave to submit an amended pleading setting forth a proper jurisdictional basis for the court to hear this case. The order directed any party wishing to submit such an amended pleading to file and serve a copy of the proposed amended pleading with an "accompanying memorandum of points in authorities in support thereof *not to exceed thirty pages, including all declarations and exhibits, if any*." (*Id.* at 7:2-3 (emphasis added).) The order permitted a party opposed to such a request to submit an opposition brief, subject to the same page limits. Following one request for an extension of time, which the court granted, American Vantage submitted a Motion for Leave to File First Amended Complaint and a Memorandum of Points and Authorities in Support thereof, along with a [Proposed] First Amended Complaint and Jury Demand. (Doc. 95.) Table Mountain did not seek leave to file an amended pleading to assert counterclaims against American Vantage; however, it has opposed the American Vantage motion, (*see* Doc. 100), and has submitted five declarations, a deposition excerpt, and a copy of Table

Mountain's Constitution and Bylaws in opposition. (Yost Decl. Ex. A 1&2, B-E.)[1]

The court now issues this order denying the motion of American Vantage for leave to file a first amended complaint, and dismissing the entire action with prejudice.

II. DISCUSSION

American Vantage makes three related contentions in support of its motion for leave to file a first amended complaint. First, by its first amended complaint American Vantage proposes to add a new party that it calls a "separate tribal business enterprise, [the] Table Mountain Casino" ("the Casino"). (Mot. at 3:19.) American Vantage argues that this "business entity" may be treated as a "citizen" of California for purposes of diversity jurisdiction. Second, American Vantage states that the "precedent for [Table Mountain's] lack of diversity jurisdiction is incorrect, inapplicable, or distinguishable." It asserts that the approximately eight reported cases the court cited in the Dismissal Order were, in essence, wrongly decided.[2] According to American Vantage,

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[1] In so doing, counsel for Table Mountain violated the provision of the court's February 28 order limiting submissions in support of and opposition to the present motion to 30 pages.

[2] These cases are *Romanella* v. *Hayward*, 114 F.3d 15, 16 (2d Cir. 1997) (per curiam) (citation omitted); *Gaines* v. *Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993) (citations omitted); *Weeks Constr., Inc.* v. *Oglala Sioux Housing Auth.*, 797 F.2d 668, 673 n.5 (8th Cir.1986) (citation omitted); *Standing Rock Sioux Indian Tribe* v. *Dorgan*, 505 F.2d 1135, 1140 (8th Cir.1974) (citations omitted); *Barker-Hatch* v. *Miejas Group Baron Long Capitan Grande Band of Digueno Mission Indians*, 83 F. Supp. 2d 1155, 1156-57 (S.D. Cal. 2000) ("*Barker-Hatch*"); *Calumet Gaming Group* v. *Kickapoo Tribe*, 987 F.Supp. 1321, 1324-25 (D.Kan:1997) (citations omitted); *Whiteco Metrocom Div.* v. *Yankton Sioux Tribe*, 902 F.Supp. 199 (D.S.D. 1995) (citations omitted); and *Calvello* v. *Yankton Sioux Tribe*, 899 F.Supp. 431, 435 (D.S.D. 1995) (citations omitted).

American Vantage states, incorrectly, that the court also relied on *Oneida Indian Nation* v. *Oneida County*, 464 F.2d 916 (2d Cir. 1972). In

these cases are all either "fundamentally wrong," based on "dicta," or predicated on a different rationale than they purported to be–i.e., on sovereign immunity, and not the non-"citizen" status of the tribe. Finally, and related to its first contention, American Vantage argues that both Table Mountain Rancheria (the tribe) and the Casino (the "separate tribal business enterprise") should be considered "unincorporated associations." American Vantage states that the requirement of "complete diversity" in cases in which an unincorporated association is a party is satisfied because "no members of Table Mountain Rancheria are Nevada citizens," and diversity is therefore "complete even considering all tribal members." (Mot. at 16:16-19.)

The court will address these contentions individually, but in a slightly different order than discussed by American Vantage.

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fact, the court did not cite the *Oneida* case at all in the Dismissal Order. The point American Vantage is making, however, appears to be that the cases in the prior paragraph are "distinguishable, based on either blind recitation of *Oneida/Standing Rock* dictum or the presence of sovereign immunity." (Mott at 11:1-2.) This contention will be discussed below.

A. Clearly Established Precedent Supports Finding No Jurisdiction Based on Diversity of Citizenship.

* * * *

B. Even if the Table Mountain Casino is Considered a "Separate Tribal Business Enterprise," It Is Not a Tribal Corporation and Therefore Not a "Citizen" For Purposes of Diversity Jurisdiction.

* * * *

C. Neither Table Mountain Nor the Table Mountain Casino May Be Sued as an "Unincorporated Association."

* * * *

III. CONCLUSION AND ORDER

For the foregoing reasons, the motion of American Vantage for leave to file a first amended complaint is hereby DENIED. This action is DISMISSED WITH PREJUDICE, and the Clerk of the Court is ORDERED to close this case.

DATED: Sept. 27, 2000 /s/ ANTHONY W. ISHII
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-17355

AMERICAN VANTAGE COMPANIES, INC.
Plaintiff-Appellant,
v.
TABLE MOUNTAIN RANCHERIA,
Defendant-Appellee.

Argued and Submitted February 14, 2002.
Filed June 14, 2002.
As Amended on Denial of Rehearing July 29, 2002.
[292 F.3d 1091]

Appeal from the United States District Court for the Eastern District of California; Anthony W. Ishii, District Judge, Presiding. D.C. No. CV-99- 05826-AWL

Before: REINHARDT, MAGILL* and FISHER, Circuit Judges.
FISHER, Circuit Judge.

We hold that an unincorporated Indian tribe such as appellee is not a "citizen" of a state within the meaning of the federal diversity statute, 28 U.S.C. § 1332(a)(1), and thus cannot sue or be sued in diversity. The district court's dismissal of this action for want of subject matter jurisdiction is affirmed.

FACTS AND PROCEDURAL BACKGROUND

* The Honorable Frank J. Magill, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appellee Table Mountain Rancheria ("Table Mountain") is a federally recognized Indian tribe located in Fresno County, California, where it owns and operates a casino on reservation land. Neither the tribe nor the casino is incorporated under federal, state or tribal law. The parties **[1094]** entered a contract through which appellant American Vantage Companies, Inc. ("American Vantage"), a Nevada corporation, provided gaming management and consulting services to the tribe in connection with operation of the casino. The contract states that the tribe "waives its sovereign immunity from suit solely for the purposes of enforcement of the terms of this Agreement" and that "either party to this Agreement may seek appropriate relief in a United States District Court, unless the parties agree to an alternate forum, for the breach of the Agreement." The tribe also executed a promissory note in favor of American Vantage.

Table Mountain unilaterally terminated the contract in 1999, a year before its expiration, prompting American Vantage to file suit against Table Mountain in federal district court in California for breach of contract and for amounts allegedly due under the promissory note. American Vantage's complaint asserted subject matter jurisdiction solely on the basis of diversity of citizenship. The district court sua sponte dismissed the complaint without prejudice for want of subject matter jurisdiction, holding that the parties were not diverse within the meaning of § 1332(a)(1) because an Indian tribe is not a citizen of any state. The court also invited the parties to file additional pleadings setting forth a basis for jurisdiction. In response, American Vantage moved to amend its complaint and to join the casino as an additional defendant. Again, it asserted only diversity jurisdiction. The district court reiterated its ruling that diversity jurisdiction did not exist as to the tribe; ruled that the casino, an unincorporated arm of the tribe, likewise could not be sued in diversity; and dismissed the action with

prejudice. American Vantage timely appealed. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

STANDARD OF REVIEW

We review de novo both the district court's conclusion that it lacked subject matter jurisdiction, *Linneen* v. *Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir.2002), and questions of statutory interpretation. *Alexander* v. *Glickman*, 139 F.3d 733, 735 (9th Cir.1998).

DISCUSSION

I. DIVERSITY JURISDICTION

A.

* * * *

[1101]

II. FEDERAL QUESTION JURISDICTION

American Vantage argues for the first time on appeal that the district court had subject matter jurisdiction on the basis of a federal question. As a general rule, we will not consider an issue raised for the first time on appeal. *United States* v. *Robinson*, 20 F.3d 1030, 1032 (9th Cir.1994). Because the plaintiff is the absolute master of what jurisdiction it invokes, "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharm. Inc.* v. *Thompson*, 478 U.S. 804, 809 n. 6, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986). Accordingly, we hold that American Vantage has waived the issue of federal question jurisdiction.[11]

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[11] On the facts of this case, we decline American Vantage's invitation to follow *Gen. Ry. Sienal Co.* v. *Corcoran*, 921 F.2d 700, 705 (7th Cir.1991) (reasoning that "dismissal should be sparingly used whenever it appears that a basis for federal jurisdiction in fact exists or may exist and can be stated by plaintiff") (quoting *Littleton* v. *Berbling*, 468 F.2d 389 (7th Cir.1972)). The district court, after dismissing

CONCLUSION

The order of the district court dismissing this action for want of subject matter jurisdiction is **AFFIRMED.**

American Vantage's claims the first time without prejudice, expressly invited the parties to offer a basis for establishing subject matter jurisdiction. For undetermined reasons, American Vantage chose to rest exclusively on diversity, raising many of the same arguments that the district court already had rejected and declining to raise federal question jurisdiction.

APPENDIX F

Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*

25 U.S.C. § 2701 - Findings

The Congress finds that -

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity

25 U.S.C. § 2702 - Declaration of policy

The purpose of this chapter is -

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming

operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue

25 U.S.C. § 2706 - Powers of Commission

(a) Budget approval; civil fines; fees; subpoenas; permanent orders

The Commission shall have the power, not subject to delegation -

(1) upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 2717 of this title;

(2) to adopt regulations for the assessment and collection of civil fines as provided in section 2713(a) of this title;

(3) by an affirmative vote of not less than 2 members, to establish the rate of fees as provided in section 2717 of this title;

(4) by an affirmative vote of not less than 2 members, to authorize the Chairman to issue subpoenas as provided in section 2715 of this title; and

(5) by an affirmative vote of not less than 2 members and after a full hearing, to make permanent a temporary order of the Chairman closing a gaming activity as provided in section 2713(b)(2) of this title.

(b) Monitoring; inspection of premises; investigations; access to records; mail; contracts; hearings; oaths; regulations

The Commission -

(1) shall monitor class II gaming conducted on Indian lands on a continuing basis;

(2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted;

(3) shall conduct or cause to be conducted such background investigations as may be necessary;

(4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this chapter;

(5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States;

(6) may procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations;

(7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission's regulations with the Indian tribes;

(8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) may administer oaths or affirmations to witnesses appearing before the Commission; and

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter

25 U.S.C. § 2710 - Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts—

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if -

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that -

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than -

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which -

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes -

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the

effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if -

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4) (A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal

licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B) (i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if -

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may

not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which -

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after October 17, 1988; and

(B) has otherwise complied with the provisions of this section. [So in original. Probably should be followed by a comma.] may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has -

(A) conducted its gaming activity in a manner which -

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii)has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for -

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii)investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation -

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706(b) of this title;

(B) the tribe shall continue to submit an annual independent audit as required by subsection (b)(2)(C) of this section and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are -

(A) authorized by an ordinance or resolution that -

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii)is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2) (A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B)The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that -

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal

Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)

(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii)Notwithstanding any other provision of this subsection -

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may,

during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3) (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to -

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of title 15 shall not apply to any gaming conducted under a Tribal-State compact that -

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7) (A) The United States district courts shall have jurisdiction over -

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)

(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that -

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith, the burden of proof shall be upon the State to

prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court -

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe

the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii)If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures -

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8) (A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates -

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter

25 U.S.C. § 2711 - Management contracts

(a) Class II gaming activity; information on operators

(1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation

and management of a class II gaming activity that the Indian tribe may engage in under section *2710* (b)(1) of this title, but, before approving such contract, the Chairman shall require and obtain the following information:

(A) the name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;

(B) a description of any previous experience that each person listed pursuant to subparagraph (A) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory agency with which such person has had a contract relating to gaming; and

(C) a complete financial statement of each person listed pursuant to subparagraph (A).

(2) Any person listed pursuant to paragraph (1)(A) shall be required to respond to such written or oral questions that the Chairman may propound in accordance with his responsibilities under this section.

(3) For purposes of this chapter, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

(b) Approval

The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least -

(1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;

(2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but does not exceed seven years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time; and for grounds and mechanisms for terminating such contract, but actual contract termination shall not require the approval of the Commission.

(c) Fee based on percentage of net revenues

(1) The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances. Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues.

(2) Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projections, for such

tribal gaming activity require the additional fee requested by the Indian tribe.

(d) Period for approval; extension

By no later than the date that is 180 days after the date on which a management contract is submitted to the Chairman for approval, the Chairman shall approve or disapprove such contract on its merits. The Chairman may extend the 180-day period by not more than 90 days if the Chairman notifies the Indian tribe in writing of the reason for the extension. The Indian tribe may bring an action in a United States district court to compel action by the Chairman if a contract has not been approved or disapproved within the period required by this subsection.

(e) Disapproval

The Chairman shall not approve any contract if the Chairman determines that -

(1) any person listed pursuant to subsection (a)(1)(A) of this section -

(A) is an elected member of the governing body of the Indian tribe which is the party to the management contract;

(B) has been or subsequently is convicted of any felony or gaming offense;

(C) has knowingly and willfully provided materially important false statements or information to the Commission or the Indian tribe pursuant to this chapter or has refused to respond to questions propounded pursuant to subsection (a)(2) of this section; or

(D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or

illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto;

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

(3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this chapter; or

(4) a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract.

(f) Modification or voiding

The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

(g) Interest in land

No management contract for the operation and management of a gaming activity regulated by this chapter shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.

(h) Authority

The authority of the Secretary under section 81 of this title, relating to management contracts regulated pursuant to this chapter, is hereby transferred to the Commission.

(i) Investigation fee

The Commission shall require a potential contractor to pay a fee to cover the cost of the investigation necessary to reach a determination required in subsection (e) of this section.

Regulations of the National Indian Gaming Commission, Department of the Interior, 25 C.F.R. §§ 501 *et seq.*

25 C.F.R. § 502.5 - Collateral agreement

Collateral agreement means any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, or organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor).

25 C.F.R. § 502.15 - Management contract

Management contract means any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation.

25 C.F.R. § 533.7 - Void agreements

Management contracts and changes in persons with a financial interest in or management responsibility for a management contract, that have not been approved by the Secretary of the Interior or the Chairman in accordance with the requirements of this part, are void.